

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
Notice of Motion No. 1593 of 2003

in

SUIT NO. 765 of 2002

Inter Sales Corporation Plaintiffs

VS.

Inertia Industries Ltd., ... Defendants

Mr. H. V.Chande for Plaintiffs.
Mr. R.S. Datar for defendants.

CORAM: **A. S. AGUIAR J.**

Date: 8/7/2005

P. C. :

1.Heard Mr. H. V.Chande for Plaintiffs and Mr. R.S. Datar for defendants. Mr. Chande states that the defendants do not wish to file any affidavit in reply. Mr.Chande argued the matter and submitted that the notice of motion be dismissed as not maintainable under Order XXXVII Rule 4, as the defendants have not set out their defence to the suit claim on merits.

2.This notice of motion is taken out by the defendants for setting aside the judgment and decree dated 7th August 2002 passed by this court in the above summary suit. It is the contention

of the defendants that the order came to be passed ex parte behind the back of the defendants. The defendants have not been served with the writ of summons or the copy of the plaint. It is pointed out that the defendants came to know for the first time about the filing of the suit when they received notice dated 6th February 2003 from the Plaintiffs' advocate informing the defendants that the Plaintiffs have filed the summary suit against the defendants. It is pointed out that the said notice from the Plaintiffs' advocate was issued to the defendants at the following two addresses of the defendants , namely, (a) Inertia Industries Ltd., A-1, Mangolpuri Industrial Area, Phase II, Delhi 110 034 and (b) Inertia Industries Ltd., Plot No. L-10, MIDC, Waluj, Aurangabad 431 136 (Maharashtra).

2. It is the case of the defendants that the said notice from the Plaintiffs' advocate at the address of the defendants at Aurangabad was received by the defendants at Aurangabad on or about 10th December 2003. The defendants on going through the said notice of the Plaintiffs realised that the writ of summons had not been served upon the defendants at any time. It is the contention of the defendants that the registered office of the defendant -

company was shifted to 0-14, 1st floor, Lajpat Nagar 2, New Delhi 110 024 with effect from 15th December 2001 and this the present location of its registered office, while the Plaintiffs have purported to serve the writ of summons upon the defendants at the address at A-1, Mangolpuri Industrial Area, Phase II, Delhi 110 034. According to the defendants the registered office of the company was shifted to its present location even prior to the shifting of the defendants administrative office to U. B. House, F- 44 A, South Extension, Part 1, New Delhi 110 049. It is further contended by the defendants that no writ of summons in the said suit was served upon the defendants at its present registered address and that in fact the writ of summons was not even issued at the registered address of the defendants company mentioned above. It is the contention of the learned advocate for the defendants that since the defendants were not served with the writ of summons they are unaware of the same when it came up before the court on the 7th August 2002, when the ex parte order came to be passed.

3. On the other hand learned advocate for the Plaintiffs has submitted that the defendants have received the writ of summons, as is manifest from

the affidavit of service of the bailiff from the Office of the Sheriff, Bombay. According to the said affidavit of the bailiff the duplicate copy of the writ of summons alongwith the copy of the plaint was dispatched by the office of the bailiff by registered post with acknowledgment due and served upon the defendants at the following address viz., Intertia Industries Ltd., A-1, Mangolpuri Industrial Area, Phase II, Delhi 110 034, and the acknowledgment card duly signed by the defendants in respect of the said packet was received from the postal authorities and is annexed to the said affidavit of service. The acknowledgment card discloses the name of the signatory as one Ajay Sharma. Learned advocate for the defendants denies that this signature is of any authorised person and specifically refers to the fact that the acknowledgment does not bear the seal of the company and therefore the same is not good service upon the defendant -company. It may be noted that the registered packet containing the writ of summons and copy of the plaint was addressed to the defendants at the address of the defendants mentioned in the title of the plaint viz., Intertia Industries Ltd., A-1, Mangolpuri Industrial Area, Phase II, Delhi 110 034, which

address the Plaintiffs had obtained from the correspondence on record with the defendants.

4. Learned advocate for the Plaintiffs submits that even if it is taken that the defendants have not been served with the writ of summons and copy of the plaint the notice of motion taken out by the defendants for setting aside the ex parte order deserves to be dismissed as the defendants have not in their affidavit in support of the notice of motion not made out any case showing any special circumstances which prevented them from applying for leave to defend or facts which entitled them to obtain leave to defend. It is the contention of the learned advocate for the Plaintiffs that the defendants have taken out this notice of motion, obviously after taking inspection of the papers and proceedings and therefore they would have been aware of the contents of the plaint and ought to have therefore set out facts touching on merits of the suit which would entitle them to leave to defend the suit. In support of his contention learned advocate for the Plaintiffs has referred to the judgment of the Supreme Court in the case of **Rajni Kumar v. Suresh Kumar Malhotra And Anr.**, reported in AIR 2003 S.C. 1322, wherein the Supreme Court has observed as under:

"It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder. Rule 4 empowers the Court to grant leave to the defendant to appear to summons and defend the suit if the Court considers it reasonable to do so, on such terms as Court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the Court all such reliefs must be claimed in one application, It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why when an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in

response to summons and limitation expired, or having appeared, did not apply for leave to defend this suit in the prescribed period, the Court is empowered to grant leave to defendant to appear to the summons and to defend the suit in the same application. It is, therefore , not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9."

5. In the above case the Apex Court held that even though the appellant had shown sufficient cause for his absence on the date of the passing of the ex parte decree he failed to show facts which would entitle him to defend the suit. In the present case it is difficult to accept defendants' claim that the writ of summons was not served upon the defendants. In view of the affidavit of service filed by the office of Sheriff it must be deemed that the defendants have been served with the writ of summons. The defendants have also failed to

make out any case on merits or set out any special facts entitling them to defend the suit. The defendants have failed to make out any case for setting aside the ex parte decree. Hence notice of motion stands dismissed. No order as to costs.

(A.S.Aguiar J.)